Plain English Writing for Sri Lanka

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Part 1 General principles of plain English

1.1 Introduction

Legalese is defined in the Oxford English Reference Dictionary as 'the technical language of legal documents.'[1] It is a general belief in legalese as the language of the law that gives it a mysterious allure to those outside the profession, to the extent that others copy it in an attempt to give an appearance of importance and authority to commonplace documents.[2] There is also a belief within some parts of the legal profession that legalese is necessary for precision to produce certainty in legal writing and this has been the major hurdle that the plain English movement has had to jump.

The thesis of this paper is that the use of plain English in legal document writing, whether it is in correspondence, agreements and deeds, court documents or judicial writing, is an important goal for the legal profession in Sri Lanka.

1.2 What is plain English?

Plain English is ordinary English. Plain English legal writing is effective writing expressed in ordinary English, using words that people without specialist legal training understand. However, plain English is not a simplified version of the English language. Writers of plain English draw upon, when it is necessary to do so, all of the words found in the dictionary.

Michele Asprey gives a definition of plain English as -

> … writing in clear straightforward language with the needs of the reader foremost in mind. There are no hard-and-fast rules. There are no international standards or infallible tests. [3]

Professor Joseph Kimble writes -

> Plain language has to do with clear and effective communication – nothing more or less. It does, though, signify a new attitude and a fundamental change from past practices.[4]

John Leahy writes (in the context of legislation) -

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[1] 2nd ed 1996.

[2] An illustration that springs to mind is of a medical certificate from a general practitioner for sick leave that starts 'I hereby confirm…'. Why is 'hereby' necessary? The signature on the certificate is itself the confirmation. However, see the discussion of 'hereby' in *Riltang Pty Ltd v L Pty Ltd* [2002] NSWSC 625 [www.austlii.edu.au/databases.html#nsw] by Professor Peter Butt, 'Recent Decisions: Does "hereby" have some uses after all?' (2002) 48 *Clarity* 34.

[3] M Asprey, *Plain Language for Lawyers*, 3rd ed, The Federation Press, Sydney, 2003 at 12.

[4] J Kimble, 'Answering the Critics of Plain Language' (1994-1995) 5 *The Scribes Journal of Legal Writing* 51.

> I do not see it [plain English] as a rigid set of techniques or rules to be applied indiscriminately. Rather, plain English is best seen as an attitude or philosophy that focuses on the client; that values the client as a client; and that values simplicity as particularly important to achieve clear, effective communication.[5]

What each of these definitions has in common is the understanding that plain English is ordinary English used effectively to convey a message to the reader with the needs of the reader in mind.

To be able to do this, one needs to understand and follow the objectives of plain English, of which there are five. They can be called the five 'Cs' of plain English.

- *Coherence* – coherence is vital in any writing. The writing must be understandable. Writing that uses plain English words, but is not coherent, is not plain English.

- *Comprehensiveness* – plain English writing must be just as comprehensive in its expression as traditional legal writing.

- *Consistency* – the 'Golden' rule in all interpretation, whether of private legal documents or of statutes, is that for the same meaning to be conveyed throughout a document, the same word is to be used. This is just as true for plain English writing as it is for the traditional form.[6]

- *Clarity* – it goes without saying that plain English legal writing must be clear. It must be able to be understood by its readers. The level of understanding will, of course, depend on the depth of legal knowledge of the target audience, but this qualification does not detract from the central need for clarity. The better the writer understands the topic before him or her, the easier it is for that writer to express complex ideas clearly.

- *Care* – care about the physical appearance of the writing on the page and care about the reader of that writing are equally important. An essential element of plain English is the 'look' of the writing - the consistency of style, font and the page layout - but it also includes use of the correct grammar and spelling. The second limb of this

[5] J Leahy, *The Advantages of Plain Legal Language*, Paper presented at the 29th Australian Legal Convention 24-28 September 1995 at 8. At the time of presenting this paper Mr Leahy was the Queensland Parliamentary Counsel. He is now the Parliamentary Counsel for the Australian Capital Territory.

[6] Those who favour traditional legal writing language use this rule to make a different point. They say that the word or the phrase they are using must continue to be used because it has been interpreted through the cases to have a particular meaning; everyone knows what that meaning is and therefore it should continue to be used. This is a specious argument. Every word or phrase that is judicially interpreted is considered in the narrow context of the particular case. To then ascribe a defined meaning to a word or phrase out of that context may be quite dangerous. It is better to think and reflect on the particular circumstances in which one wishes to use particular words, than to resort to hackneyed phrases in a hope that they may 'cover the field'. That said, where a phrase or word has been used in an Act, and the instrument the solicitor or barrister prepares relates in some way to that Act, then obviously the correct approach is to use the words in the instrument that are used in the Act. If the words are changed, then the question arises whether the meaning is changed. This leads to uncertainty.

objective is care about the reader. A writer will usually know who the target audience is. A good writer understands and focuses on the reader's needs and, by using plain English, is able to convey necessary information to any reader at a level that reader can understand.

1.3 Why should the legal profession and the judiciary use plain English?

Plain language helps the user in his or her understanding of the document's operation. While a legal practitioner must always explain legal documents to a client, explanation is less difficult if the document is written in plain English. As plain English demands that the document be easy to read and understand, it forces the writer to be more efficient in the use of language. Legalese obscures the meaning: plain English exposes it.

Trust is a very important element in the lawyer-client relationship. If the lawyer drafts documents for his or her client in plain English, there is less need for detailed explanation. The client can see what he or she is getting from the lawyer. Plain English is therefore a marketing tool, which can be used by enterprising firms with considerable effect. The firm image is enhanced and the client base is enlarged. The marketing of a culture of plain English writing and precedent drafting is one area where small firms are able to compete with the larger national firms.

Judges in Australia and the United Kingdom have recently criticised unclear writing. Although legislation appears to bear the brunt of the courts' criticism,[7] other legal documents do not escape.[8] There has also been recent criticism of writing that purports to be in plain English [9] and praise for good plain English.[10]

Increasingly, parliaments are enacting statutes that require the use of plain English in legal documents. Plain English has become a conduit in improving access to justice for consumers of legal products. In Queensland, the Industrial Relations Commission must write its judgments in plain English[11] and legal practitioners must write their client agreements in plain English,[12] as must practitioners in Victorian firms.[13] Other statutes that insist on plain English communication in particular contexts include the *Industrial Relations Reform Act 1993* (Cth),[14] and the *Residential Tenancies Act 1994* (Qld).[15] All

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[7] For example see *Ditchburn v Seltsam* (1989) 17 NSWLR 697 at 698. For a section that is almost incomprehensible, see s 81 of the *Instruments Act* 1958 (Vic). It is a single sentence of 448 words. See also *Walters v Reno* US Court of Appeals 9th Circuit (1998) US App LEXIS 9846 (18.5.98) and *Trafalgar House Construction v General Surety & Guarantee Co* Unreported, 22 February 1994, CA, Bingham MR, Beldam, Saville LJJ, [1996] 1 AC 199.

[8] *National Bank of Australasia v Mason* (1975) 133 CLR 191 at 203; *Houlahan v ANZ Banking Group Ltd* (1992) 110 FLR 259.

[9] *Halwood Corporation Ltd v Roads Corporation* Unreported, no 6505/1994, 30 June 1997, Brooking, Tadgell and Ormiston JJA.

[10] *Re Piccolo: McVeigh (Trustee of the Bankrupt Estate of John Peter Piccolo) v National Australia Bank Ltd*, (2000) FCA 187 (28 February 2000) Full Court.

[11] *Workplace Relations Act 1997* (Qld) s 348; *Industrial Relations Act 1999* (Qld) s 333.

[12] *Queensland Law Society Act 1952* (Qld) s 48.

[13] Legal *Practice Act 1996* (Vic) s 88.

[14] Section 150A(2)(d).

Queensland legislation must be drafted using plain English principles when it is reprinted,[16] and governments have introduced plain English policies in public administration.[17]

Judgment writing particularly lends itself to the practice of plain English principles. It is a well-accepted principle of justice that the primary task of any decision-maker when giving reasons for a decision is to explain the reasoning in clear unambiguous terms that each party can understand, rather than in terms that are legalistically framed to withstand scrutiny by a higher authority.[18] Judges, often writing extra-judicially, have repeatedly stressed that the primary purpose of judgments is to explain to the parties, especially the losing party, how and why the decision was reached.[19] Setting aside the technical legal requirements,[20] the consistent view appears to be that each part of the reasons must be understood by the target audience,[21] the language used must be specific and unambiguous[22] rather than vague in nature,[23] and esoteric terms and complex legalistic language should be avoided.[24] These requirements are principles of all plain English writing. A further principle of plain English legal writing requires the writer to use an

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[15] Section 39(5) specifies that residential tenancy agreements 'must be written in a clear and precise way.' One of the factors to be considered in deciding whether an action is unconscionable under the *Trade Practices Act 1974* (Cth) is 'whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services' - section 51AB(2)(c).

[16] *Reprints Act 1992* (Qld).

[17] Personal communication with officers of Crown Law, Queensland Department of Justice and Attorney-General.

[18] See the comments on this point in *Commentary on the Practical Guidelines for Preparing Statements of Reasons* Administrative Review Council (ARC), Commonwealth of Australia, Canberra, 2000 and Wayne Martin QC, 'The decision maker's obligation to provide a statement of reasons, fact and evidence. The Law', 10.9.99, http://152.91.15.12/arca/martin.html at 12.

[19] McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd*(1987) 10 NSWLR 247 at 279; the Hon GL Davies 'Common Pitfalls in Judicial Decision-making' (2002) 11 *Journal of Judicial Administration* 130 at 137 ; the Hon John Doyle, 'Judgment Writing: Are there Needs for Change?' (1999) 73 *ALJ* 737 paraphrasing the word of Sir Frank Kitto 'Why Write Judgments?' (1992) 66 *ALJ* 787 at 788; the Hon Ros Atkinson, 'Judgment Writing', an address given at the Queensland Magistrates Conference 21.3.2002 at p 2.

[20] That is, what constitutes material facts and the evidence on which they are based. The view has been put in a number of cases that the requirement to give reasons does not mean that the reasons have to be perfect; rather they must substantially comply with the statutory requirement. Sheppard J noted in *Bisley Investment Corporation v Australian Broadcasting Tribunal* (1982) 59 FLR 132 at 157 that 'The section [*Administrative Appeals Tribunal Act 1975* (Cth) s 43(2)] does not impose upon the Tribunal, which is often composed of members who are not trained in the law, any standard of perfection. I consider the provisions of the section to be directory rather than mandatory. Substantial compliance is what is required…' See H Katzen, 'Inadequacy of Reasons as a Ground of Appeal' (1993) 1 *AJAL* 33 at 38, 42: also see T Thawley, 'An Adequate Statement of Reasons for an Administrative Decision' (1996) 3 *AJAL* 189 at 192.

[21] T Thawley, 'An Adequate Statement of Reasons for an Administrative Decision' (1996) 3 *AJAL* 189 at 192.

[22] The Hon Alan Goldberg, 'When are Reasons for Decision Considered Inadequate?' *Australian Institute of Administrative Law Forum* No 24, 1999 at 5.

[23] W Martin, QC, 'The decision maker's obligation to provide a statement of reasons, fact and evidence: The Law', 10.9.99, http://152.91.15.12/arca/martin.html at 12.

[24] H Katzen, 'Inadequacy of Reasons as a Ground of Appeal' (1993) 1 *AJAL* 33 at 38 at 47.

appropriate plain English document structure for the task in hand.[25] These principles need to be examined individually.

1.4 Relevant principles of plain English for document writing

Important plain English principles

- Write for the target audience, so that the readers understand the document;
- Write clearly, unambiguously and without using vague language;
- Avoid esoteric and complex legal language; and
- Use the appropriate document structure.

writing for the target audience

There are three questions the writer must ask. For whom is he or she writing? Who will use the document? What are the needs of the reader?[26]

To answer the first question the writer should put himself or herself as much as possible in the position of the reader. One must never assume that the reader is familiar with terms of art or technical language and the writer should try to move away from excessive formality and avoid using legalese, unfamiliar jargon or a bureaucratic approach. The cultural and ethnic background of the reader may be a very important consideration as may be the age and gender of the reader. Above all, it is important that the information to be conveyed is set out logically and clearly. Even if the audience is a technical one, it is no excuse to use language that is overly dense and difficult to follow.

The answer to the second question depends on the particular circumstances. The intended audience for a letter of advice may be very limited; a public notice may have a broad and diverse one.

Finally, addressing the needs of the reader is a skill that the writer will learn through experience. The reader might be expected to fill out a form, take action based on the information in the document or read it and remember it. There are many possible consequences. The most important point from the writer's perspective is to convey the information using the '5 Cs' principles.

writing in clear, unambiguous language

In an excellent article,[27] Mr Hayley Katzen gives two illustrations of problems that may arise because of unclear decision writing. The first comes from a judgment of Von

[25] J Kimble, 'Writing for Dollars, Writing to Please' (1996/1997) 6 *Scribes J Legal Writing* 1 at 5-7; D Clark-Dickson and R Macdonald, *Clear and Precise: writing skills for today's lawyers*, QLS CLE Brisbane, 2002, Chapter 5, Document presentation.
[26] D Clark-Dickson and R Macdonald, note 25 at 12-13.
[27] 'Inadequacy of Reasons as a Ground of Appeal' (1993) 1 *AJAL* 33 at 42: see also T Thawley, 'An Adequate Statement of Reasons for an Administrative Decision' (1996) 3 *AJAL* 189 at 192.

Doussa J in *McAuliffe v Secretary Department of Social Security* in which he criticises the use of the words '[the Tribunal] has difficulty in accepting the applicant's explanation of these bank records'. Von Doussa J said –

> This is an unhappy choice of language as it does not – in plain unambiguous words – say whether the applicant's explanations are rejected, or are accepted, albeit with difficulty.[28]

The second illustration comes from *Dolan v Australian and Overseas Telecommunication Corporation.*[29] Spender J noted that 'the Tribunal's comment that the applicant's evidence…should be "treated with caution" was "not the same thing as saying that her evidence is rejected, or that the conclusions of the medical practitioners should for that reason, not be relied upon."'

Avoiding esoteric and complex legal language

Commentators on legal writing have lamented the way in which lawyers, in their written communication, have held on to quaint turns of phrase that other writers have discarded. Lawyers do not achieve a greater certainty by writing 'null and void' than they do by writing 'of no legal effect'. So one of the obvious ways to open up the language of the law is by questioning the suitability of words and phrases that are used in legal writing, but not in, or rarely in, any other case. The suggestions below are a selection only of the many ways legal language may be made more accessible to non-legal audiences.

Use less formal words

There are a large number of verbs that lend themselves to formal legal writing, but which could easily be replaced by more easily understood ones. To give some examples – 'elucidate', 'construe', 'determine', 'demise', 'attest', 'terminate', 'procure', 'devise', 'rescind', 'effect'. These words are generally not in common usage, and some of those that are take a different meaning in law from the ordinary meaning. There are clearer ways to write today.

Avoid using a number of words where one would do

Lawyers seem naturally drawn to the use of more words (word clusters) than are necessary to convey a point. Butt and Castles in their book *Modern Legal Drafting*[30] eloquently explain one of the reasons for this as the practice over many centuries to pay for documents according to their length. There are a number of ways to increase the length surreptitiously. One is to add a noun to a preposition to make simple word clusters – 'by means of' instead of simply 'by'. Another is to use synonyms, called 'doublets' ('save and except') and 'triplets' (rest, residue and remainder'). While the use of any

[28] 13 AAR 462 at 473.
[29] (1993) 17 AAR 355 at 367.
[30] Cambridge University Press, Cambridge, 2001 at 26-30.

expression needs to be evaluated in the particular context in which it is written, legal writing can generally be improved by replacing these word clusters with one word.

Avoid unnecessary words

There are many phrases in private and public documents that, when they roll out of the printer, are simply bad English. Many are tautologous. Their use, apart from adding to verbosity, gives the appearance that the writer did not think about the document before writing.[31] An illustration is the use of 'true copy' – this is a tautologous phrase. How can a copy be a copy if it is not 'true'? An adjective should be used with the word 'copy' only when it describes a particular type of copy – a 'certified copy' or a 'handwritten copy'. 'True' adds nothing and should not be used.

Other examples of unnecessary words are –

'terms and conditions' – is there any occasion when a condition of a contract is not also a term? Use 'terms'.
'including but not limited to…'. The phrase '… but not limited to.' is redundant. Including' *means* 'not limited to'.
'lawful authority' – again tautologous. If authority is not lawful it is not authority.

Avoid the use of nominalisations[32]

Rather than 'making an application', one should 'apply'. ' The licensee must make an application…' becomes – 'The licensee must apply…' Instead of 'making a statement', 'providing an explanation', 'drawing a conclusion', and 'giving satisfaction,' is it not clearer to 'state', 'explain', 'conclude' and 'satisfy'?

Do not use archaic words or Latin phrases

There are a number of words that have no place in plain English today except, apparently, in legal language. They are rightly called 'archaic words'. If it appears that one or more of these words must be used to give meaning or emphasis to the words surrounding it, then the simplest solution is to redraft the passage. Here is a short selection of archaic words that are often used in a legal context -

heretofor, hereinafter, hereby, herewith
thereof, thereinbefore, thenceforth,
said (adj), aforesaid, abovementioned
herein, hereon, hereto, hereof, hereunder
whatsoever, wheresoever, howsoever,
notwithstanding, whereas, whereupon.

[31] A word of caution needs to be inserted here. Statutes may contain phrases that appear tautologous. For instance 'proper notice' as defined in a statute would not be tautologous, whereas in another context it may be.

[32] The changing of verbs into nouns – the changing of nouns into verbs is known as conversion.

Some Latin phrases such as '*de facto*' and '*per annum*' have moved from the legal into the popular vocabulary, but most[33] Latin words and phrases can be replaced by English phrases with no loss of meaning.

Write in gender neutral language

In English the most common problem relating to gender in legal drafting is the use of the masculine third person pronoun in all its forms - 'he', 'him' and 'his'- in formal documents to include the feminine pronoun. One of the factors influencing this is the provision in many property statutes that use of the masculine gender extends, where appropriate, to the feminine and neutral gender. While the statutes make this clear, when using plain English it is preferable to avoid the need for this legal backstop. Moreover, it is now unacceptable to assume that all people in influential positions are male. Lawyers can reduce the need to use gender-specific language by following some simple guidelines.

Guidelines for using less gender-specific language

- Use gender-specific pronouns only to identify a specific person or gender and do not use gender specific language where gender is unclear
- If the document refers to an office, rather than the incumbent of the office, use gender neutral references
- If it does not change the meaning of the sentence, use plural nouns and pronouns to remove gender distinctions
- Write the sentence without pronouns
- Try to avoid conditional structures, generally introduced by 'if' or 'when', which often require the use of pronouns
- Use a more descriptive or inclusive word, such as 'people' or 'worker' instead of 'men' or workman'
- Write from a first-person ('I') or second person perspective ('you'). Only the third-person singular pronoun is gender-specific.

using an appropriate document structure

Professor Joseph Kimble, after undertaking a number of studies on the benefits of plain English writing, devised a checklist of the ways in which a legal writer could improve the quality of his or her writing, with a particular focus on the structure of the document.[34]

checklist for improving legal writing

[33] The former Centre for Plain Legal Language at the University of Sydney produced a fact sheet in 1994 in its newsletter *Explain* - 'Save Latin for your clients who are Ancient Romans' by Maria Hunter and Amanda Chambers; (1994) 1 *Explain*, 2. It contains a useful list of Latin words and suitable plain English alternatives.

[34] J Kimble , 'Writing for Dollars, Writing to Please' (1996/1997) 6 *Scribes J Legal Writing* 1 at 5-7.

- pay attention to the physical document design – the fonts used, the length of the lines, the amount of white space on each page and the line-spacing
- divide the writing up into short sections
- use headings liberally
- group related ideas and use a logical sequence when drawing the groups together
- use an executive summary at the beginning of the writing
- use examples, tables and charts
- eliminate unnecessary words and details
- break up long sentences
- prefer the active voice
- put the action into verbs, not abstract nouns; and
- use lists for multiple conditions, consequences or rules

This has been just a taste of the potential the application of plain English principles has to transform legal writing in all legal systems. There is a list of reference books at the end of this paper that are most useful to practitioners who want to improve their legal writing in this way. Legal practitioners everywhere have a lot to gain by exposing the complex and difficult writing that is traditional writing.

The second part of this paper critiques legal documents in use in Sri Lanka and examines ways in which they may be redesigned into plain English documents by using the principles described in Part 1.

Part 2 Plain English in practice.[35]

2.1 Plain English agreements and deeds

When drafting agreements and deeds lawyers should follow a four-step process. The steps are to write out the draft document, put it aside for a period of time, read and reflect on what has been written and then re-write the document in its final form, incorporating the changes reflection has shown are necessary.

The draft document

As they write drafters need to be conscious of and pay attention to the document's structure, its contents and the language used in it. The first question they need to address is form. For instance - should the document be written as a deed?

[35] It may be that in the plain English redrafting of documents that follows, others who may be better informed in the particular field of law and the specific legislation applying to it in Sri Lanka will disagree, from a legal perspective, with the wording of a particular sentence or a clause. If this is so then clearly the sentence or clause needs to be amended, but any amendment needs to be written in plain English.

The drafting of deeds is a routine matter in most legal offices and often a precedent form is used without regard for the particular format required.

A deed is an instrument by which a right, an obligation, an interest or property may be created or transferred, or such a transfer is confirmed. Deeds are necessary if obligations are to be imposed and consideration has not been provided. Instruments dealing with trusts, releases, and powers of attorney, to name a few, are all written as deeds.

Structure

Documents of the same kind usually have the same structure. A deed usually comprises a number of parts.

Parts of a deed

- the name of the document, the names of the parties and the date
- the background: this is sometimes called the recitals. This is where the drafter describes the background to the creation of the document. It is not legally necessary in a deed, but may be a useful inclusion in the document
- the operative part of the deed: this is the part of the deed that sets out the obligations of the parties and the terms that apply
- the schedule: here are found matters of factual detail that relate to the operative part of the deed
- the execution clause
- attachments and appendices

Contents

The operative part of a deed (or contract) contains the most important information in the document, whether it is a deed or a contract. While a drafter needs to write all the parts of the document carefully, the operative part is often the part that contains the most detailed and technical provisions and the drafter should pay special attention to its structure.

Checklist for drafting the operative part of a deed

- use a definition clause if it is appropriate
- decide whether to use an interpretation clause
- position the more important matters at the beginning of the operative part
- keep specific matters separate – for example do not mix the parties' obligations in the same clause
- give an appropriate heading to each clause
- place each matter with those related to it – for instance, clauses dealing with the lessee's obligations in a lease are grouped together, as are those dealing with the lessor's obligations
- break complex clauses up into their constituent parts

- use paragraphing to break up complex clauses; and
- place generic clauses at the end of the operative part – for example clauses dealing with notices, service, governing law, dispute resolution, etc.

As an illustration of some of these principles consider the following short clause, taken from a lease –

> No obligation shall be imposed upon the Lessee in respect of any structural maintenance, replacement or repair except when rendered necessary by or arising out of any act, omission, neglect, default or misconduct of the Lessee or the Lessee's invitees, or by or arising out of its or their use or occupancy of the Premises or by the Lessee's Equipment.

A clearer draft using paragraphing is as follows –

> **Structural repair**
>
> The Lessee is not liable for any structural -
> (a) replacement; or
> (b) repair; or
> (c) maintenance,
> unless it is necessary because of –
> (d) the Lessee's or the Lessee's invitees' -
> (i) deliberate or negligent act or omission; or
> (ii) misconduct; or
> (iii) use or occupancy of the premises; or
> (e) use of the Lessee's Equipment.

Definitions

Although it is increasingly the case that general definitions in statutes are found, not at the beginning of the Act, but in a schedule at the end, lawyers generally do not do so when drafting private documents. The practice is to place definitions and interpretation clauses at the beginning of the operative part. This is a practice that should be continued. A person needs to know what a word or phrase means before reading it in the document.

Once words have been defined, there are a number of ways to highlight defined words throughout the document. Computer programs allow the use of **bold**, *italics*, a different font, underlining, CAPITALS, Initial Capital Letter and a different colour. Once a particular highlighting method has been chosen, it must be used consistently throughout the document.

Interpretation clauses

Interpretation clauses often recite, among other things, that –

- ‘month’ means calendar month;
- ‘person’ includes a corporation;
- the masculine gender includes the feminine gender; and
- the singular includes the plural and vice versa.

In Australia at least this list of common word meanings is redundant in the document itself because legislation in all states contains these provisions, or variations on them.[36] The interpretation clause also often expressly provides that the headings of the various parts and clauses of the document are for convenience only and are not to be used to interpret the agreement. This has the potential to be a particularly dangerous principle of interpretation, and should be considered carefully before it is used. The danger arises when a drafter uses the heading as an interpretative aid when drafting the document but fails to see the ambiguity that may arise if this principle of interpretation is followed. In Australia, headings may now be used in interpretation of statutes: there is no reason why the case should not be the same for simple contracts, deeds and other instruments.

Language

When drafting documents lawyers use certain words that, if they stopped and thought about it, they would not. Some examples, together with preferred alternatives follow.

- *‘and/or’*

This is bad drafting. Contrary to popular belief, it confuses rather than clarifies meaning. If a drafter needs to use ‘and/or’, the passage needs to be re-drafted. Use ‘either A or B, or both’ instead.

- ‘the lessor’s *prior written consent’*

There is no need to write this: instead rephrase the sentence – ‘the lessor’s written consent …’

- ‘*in respect of*’, *‘in relation to’, ‘in accordance with’*

There are a number of prepositions or prepositional phrases that may be used instead of the formal language – ‘for’, ‘of’, ‘about’, ‘under’, ‘because of’.

- *‘shall’, ‘such’, ‘the same’, ‘said’*

The debate about the use of ‘shall’ and its potential ambiguity is as old as the plain English movement. In short, there is no need to use ‘shall’ in drafting. Replace it by ‘must’ if the actor is obliged to act, ‘may’ if the actor has a discretion and ‘will’ when referring to a future action. ‘Such’ when it comes before a noun as in ‘such material’ is not as clear in meaning as ‘this material’ or ‘that material’. ‘Same’ when used as a noun, as for instance in ‘…deliver the same to the office’ should be replaced by the appropriate

[36] See for example *Property Law Act 1974* (Qld) s 48(1).

pronoun - 'it' or 'them'. The only time 'said' should be used in any legal writing is as the past tense of the verb 'to say'. It is not an adjective. If a drafter finds that 'the said…' appears on the page in front of him or her, the passage should be redrafted so that 'said' is removed.

Reflection

After writing the draft document reflection is necessary because a drafter who has had a close relationship with a particular document over a period of time may not draft it objectively. For reflection to be effective, the document must be put aside for some time. Putting aside the document has been referred to earlier as one of the four steps, but it is more like an interlude between the first and second step. Even if it is put aside for a couple of hours, when it is re-read, he or she will be able to see it in a fresh light and with a critical eye. Typographical mistakes and grammatical errors may be obvious when previously they were not. Legal flaws may become apparent and questions of style will be more easily addressed.

After reflection and re-writing it is helpful if a colleague is able to review a draft document. In a busy practice it may be difficult to find a colleague who is willing to do it. However, it is a useful task to undertake and good for business too as, if it prevents mistakes in style, syntax, grammar and legal content, it is a good insurance policy for the firm.

Rewriting

Rewriting is usually necessary because, even if there are no major deficiencies in the document, on reflection the drafter usually finds that one point or the other could have been expressed more clearly or there is a need for additional information.

Deeds – an example of plain English

The following clauses, which illustrate a number of the features of legalese are from a Sri Lankan lease.

Original clauses

DEED OF LEASE

THIS INDENTURE OF LEASE made and entered into at … in the Democratic Socialist Republic of Sri Lanka on this Twenty-Sixth Day of September Two Thousand and Three by and between Fred Smith of 3 Fort Street … (hereinafter sometimes called and referred to as the Lessor which term or expression as herein used shall where the context so requires or admits mean and include the said Fred Smith his heirs executors administrators and assigns) of the One Part and Joe Bloggs presently of No 1 Victory Road… (hereinafter sometimes called and referred to as the Lessee which term or expression as herein used shall where the context so requires or admits mean and include the said Joe Bloggs his heirs executors and administrators) of the Other Part.

-:WITNESSETH:-

THAT for and in consideration of the rents to be paid by the said Lessee and his aforewritten as hereinafter provided unto the said Lessor and his aforewritten and in consideration of the covenants provisions and agreements hereinafter contained on the part and on behalf of the Lessee and his aforewritten to be paid observed and performed the said Lessor doth hereby let lease and demise unto the Lessee and his aforewritten all that annex only bearing Assessment No 3A Fort Street …fully described in the Schedule hereto together with the fixtures fittings and electrical fittings fully described in a separate inventory to be signed by the Parties hereto and together with all and singular the rights privileges easements servitudes and appurtenances whatsoever to the said premises belonging or used or enjoyed therewith or reputed or known as part and parcel thereof and all the estate right title interest property claim and demand whatsoever of the said Lessor of in to upon or out of the same.

…

IN WITNESS WHEREOF the Lessor and the Lessee have hereunto and to two others of the same tenor and date as these presents set their respective hands at the place and on the date at the beginning hereof written.

A plain English version of this passage is written below. A large part of the original has been removed. Instead of defining the Lessor in the following terms '(hereinafter sometimes called and referred to as the Lessor which term or expression as herein used shall where the context so requires or admits mean and include the said Fred Smith his heirs executors administrators and assigns) of the One Part' note that the re-written version simply tells us that Fred Smith is the Lessor. The definitions of Lessor and Lessee are removed and placed in a definitions section at the beginning of the Operative Part of the deed of lease. The archaic language – 'hereunder', 'herein', 'presents', 'aforewritten' 'said', 'doth', 'unto' and words and phrases - has been removed and not replaced. Some of the original language is contradictory – 'admits, means and includes'. 'Means and includes' in this context is confusing and unintelligible, as are other phrases – what does 'his aforewritten' mean?. There are a number of redundant phrases –'hereinafter sometimes called and referred to..', 'reputed or known as..', 'of in to upon or out of the same'.

The re-written version achieves the same result, but is very much easier for all to understand.

Re-written clauses

THIS DEED of LEASE is made at … in the Democratic Socialist Republic of Sri Lanka on 26th September 2003 between Fred Smith of 3 Fort Street … (the Lessor) and Joe Bloggs of No 1 Victory Road… (the Lessee).

Operative Part

1. Definitions

'Lessor' includes the Lessor and the Lessor's heirs, executors, administrators and assigns.
'Lessee' includes the Lessee and the Lessee's heirs, executors and administrators.

'Premises' includes –
(a) the fixtures, fittings and electrical fittings as described in a separate inventory signed by the Parties ; and
(b) the rights and interests incidental to the Premises.

2. Grant of Lease

In consideration of the payment of rent and the performance of all obligations under the Lease by the Lessee, the Lessor leases to the Lessee the Annex being Assessment No 3A Fort Street …as described in the Lease Schedule (the Premises).
…

Executed by the Parties as an original and two copies on 26th September 2003.

2.2 Plain English court documents

In general terms, Rules of Court governing the conduct of civil litigation are not prescriptive about the writing style to be adopted in the drafting of court documents. As with drafters of other legal documents, however, it is undoubtedly the case that litigators have developed their own 'legalese' that characterises affidavits, pleadings and other court documents. Numerous examples are found in even very modern works providing litigation precedents. Often the adoption of this 'legalese' has meant the abandonment of correct English.[37]

The reassessment of the writing and drafting skills of lawyers that has taken place in recent years has tended to focus on the writing of letters, wills and commercial documents. Indeed it could be argued that until comparatively modern times court documents could not generally be produced in plain English because the forms prescribed under the various rules of court were themselves written in antiquated styles and completing them in plain English go only part of the way.[38]

[37] See, for example, the observation Anthony Morris QC in relation to the drafting of affidavits that: 'It is desirable, although in practice it seldom happens, that the contents of those paragraphs achieve at least substantial compliance with the rules of syntax and grammar; and it also adds a flavour of "professionalism" if the spelling is correct' : AJH Morris QC, 'Drafting Affidavits Made Simple' (1989) 6 *Qld Law Soc J* 247 at 250.

[38] For example: typical of the standard form for a writ of summons used to commence proceedings in Australian jurisdictions was Form 1 under the *Rules of the Supreme Court 1990* (Qld) (now repealed), which commenced:

> We command you that within… days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in Our Supreme Court of Queensland, at Brisbane, in an action at the suit of A.B; and take notice in default of your doing so the plaintiff may proceed therein, and judgment may be given in your absence.

It is beyond dispute that the reasons for adopting plain English drafting techniques apply with equal force to the drafting of court documents, and indeed to the drafting of the rules of court which govern them. Fortunately there has been a movement in many countries in recent years to modernise the language of the rules of court and the forms for use under those rules. In Australia, several states have replaced their rules of court entirely with new rules that significantly simplify procedures and are written in plain English.[39] The *Uniform Civil Procedure Rules 1999* (Qld) provide the best example. These rules apply to the three levels of courts in Queensland – the Magistrates Court, the District Court, and the Supreme Court. Previously each of these courts had its own rules.[40] The number of court documents that must be presented in a prescribed form has also been substantially reduced and those approved forms are written in plain English.[41]

The Rules of Court in Sri Lanka have yet to undergo a rigorous re-examination and simplification. The *Court of Appeal (Appellate Procedure) Rules 1990*, for example, breach many of the principles of plain English drafting.[42] No doubt the Rules of Court will in time be modernised by amendment, or be replaced with new rules in simplified plain English. In the meantime, members of the legal profession should follow the international trend and, so far as the relevant rules of court and prescribed forms permit, move towards the production of court documents in jargon-free simple, and correct, English.

Affidavits - an example

The adoption of general principles of plain English drafting is vital for affidavits.[43] Affidavits are sworn or affirmed by the witness and they should be prepared in a

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> WITNESS – The Honourable …, Chief Justice of Queensland, at Brisbane, the …day of … in the year of our Lord One thousand nine hundred and …

[39] *Uniform Civil Procedure Rules 1999* (Qld); *Rules of the Supreme Court 2000* (Tas); *Supreme Court (General Civil Procedure Rules) 1996* (Vic). In England the *Civil Procedure Rules 1999* (UK), which commenced on 26 April 1999, are a step in the right direction, but are open to the criticism that they still breach many of the principles of plain English drafting. In particular, they use in many instances archaic words of the kind described above, and they are not drafted in gender-neutral language.

[40] *Magistrates Court Rules 1960* (Qld); *District Court Rules 1966* (Qld); *Rules of Supreme Court 1900* (Qld).

[41] The *Uniform Civil Procedure Rules 1990* (Qld) and the forms approved for use under those rules may be accessed at: http://www.courts.qld.gov.au/. For the equivalent form to the previous writ of summons extracted in part above, see the Claim in Form 2 of the Forms approved for use under the *Uniform Civil Procedure Rules.*

[42] Examples include the use of archaic words such as 'hereinafter' (Rule 1(1)), 'thereto' (Rule 1(1), 'aforesaid' (Rules 1(6), 3(2)), 'thereupon' (Rules 2(8), 4(11), 4(12)) , 'thereof" (Rules 3(5), 4(4), 4(5)(c), 4(7), 4(9)), 'said' (r4(4), 'therein' (r5(4)); the use of a number of words where one will do (for example: 'deal with and determine' (Rule 2(8)), 'false or incorrect' (Rule 3(2)); the use of gender-specific language (Rules 3(8), 4(2), 4(7), 4(9), 5(4)); and the use of unnecessary words (for example: 'in such manner and within such time' (Rule 3(9)), 'the provisions of the preceding subrules' (Rule 4(10)).

[43] 'Affidavit' is one Latin word that, lawyers argue justifiably, is a technical word and should be untouched because although it is simply a sworn statement of fact, it is subject to statutory rules about contents and appearance that other sworn statements are not.

language that the witness may regard as his or her own words, rather than those of the practitioner.

Few litigation practitioners have not witnessed a situation in which the deponent to an affidavit has been forced to concede under cross-examination (or sometimes even under examination-in-chief as a means of explaining away their own conflicting oral evidence) that they swore or affirmed the contents of an affidavit because it was presented to them by their lawyers as a document required for their case, and that they did not understand at least part of its contents. What excuse can be offered by the lawyer if the affidavit has been prepared in language which realistically will only be understood by lawyers?

Although a bank of useful precedents may be regarded as a necessity in any legal practice, the adoption of precedents for various forms of affidavit without analysis of the need for the particular expressions used has resulted in many expressions that find their way into affidavits with a ritualistic mindlessness which can, and should, be challenged.

In this section the principles described earlier are applied to the drafting of an affidavit. The primary paragraphs below are taken from a simple affidavit filed in the Court of Appeal in Sri Lanka. The drafting style will be very familiar to litigation practitioners. Comments about the drafting of each paragraph follow in italics and within square brackets.

Original paragraphs

1. I am the affirmant abovenamed and the facts affirmed hereunder are from my personal knowledge and from the documents that are at my disposal.
   [‘*I am the affirmant abovenamed’ does not add anything. The balance of the paragraph is also unnecessary, as the person making the affidavit cannot affirm statements that are neither within their personal knowledge, nor apparent from documents in their possession*.[44]]

2. I state that the claimant-Petitioner (Hereafter called and referred to as the Petitioner) is a duly incorporated company with limited liability duly incorporated in Sri Lanka and having its registered office at the abovementioned address. The Petitioner has annexed to the Petition a true copy of the certificate of Incorporation marked “A” pleaded as part and parcel thereof.
   [‘*I state that’ is unnecessary. ‘Called and referred to’ is a classic example of the use of a number of words when one would do. In any event the whole phrase ‘Hereinafter called and referred to as’ is unnecessary. Would the meaning not be clear if simply ‘(the Petitioner)’ was used. Do the words ‘duly’ or ‘incorporated’ add anything? Both may be regarded as unnecessary the meaning would be clear without them. If it is necessary to restate the address of the company in the*

[44] The equivalent paragraph at one time almost invariably used to conclude an affidavit in Australian jurisdictions was: ‘All the facts and circumstances deposed to herein are within my own knowledge save such as are deposed to from information and belief and my sources of information and grounds for my belief are set out on the face of this my affidavit.’ Thankfully, this paragraph or an equivalent is now very rarely seen.

contents of the affidavit it is simpler and clearer to state that address. As has been discussed, 'true' adds nothing to 'copy' and should not be used. 'Pleaded as part and parcel thereof' involves both the use of a number of words when one would do, and includes an archaic word. It is probably the case that the whole phrase may be omitted as the incorporation of the annexure to the Petition as part of the pleading would surely be apparent from the Petition.]

3. The Respondent-Respondent is a duly incorporated company with limited liability duly incorporated in Sri Lanka and having its registered office at the abovementioned address.
   [*The same comments apply as in relation to paragraph 2. Further, the use again of 'abovementioned address' breaches the 'golden' rule (see para 1.2) that the same word or words should be used to imply the same meaning. Presumably it is a different 'abovementioned address' to that intended by the phrase in paragraph 2.*]

4. The Respondent filed action against XYZ Pty Limited for the recovery of US$... in DC Colombo action No…. I state that the Petitioner was not a party to the said case though the two Companies belong to the same group. The Petitioner has annexed to the Petition, a true copy of the Plaint and the answer of the said case marked "B" and pleads same as part and parcel thereto.
   [*Again 'I state that' is unnecessary. It is apparent from the balance of the affidavit that the 'two companies' referred to are the Petitioner and XYZ Pty Limited. However as the paragraph has reference to three companies (the Petitioner, the respondent, and XYZ Pty Limited) it would assist the clarity of the paragraph to name the companies stated to belong to the same group. The use of the 'action' and 'case' to mean the same thing is undesirable and it would aid the consistency of the affidavit to use the same terminology for each reference to the earlier action. The punctuation in the final sentence is inappropriate. The use of the word 'said' (as an adjective) and 'same'(as a noun) is archaic and should be avoided. Comments in relation to 'true' copy and pleading 'as part and parcel thereto' as made in relation to paragraph 2 again apply.*]

The same content should be more simply presented as follows:

Re-drafted paragraphs

1. The claimant – Petitioner (the Petitioner) is a limited liability company incorporated in Sri Lanka, with its registered office at…The Petitioner has annexed to the Petition and marked 'A' a copy of its certificate of incorporation.

2. The Respondent – Respondent is a limited liability company incorporated in Sri Lanka with its registered office at…

3. The Respondent filed action against XYZ Pty Limited for the recovery of US$...

in DC Columbo in Action No… The Petitioner was not a party to that action, although the Petitioner and XYZ Pty Limited are part of the same group of companies. The Petitioner has annexed to the Petition and marked 'B' a copy of the Plaint and the answer in that action.

Some other examples of ritualistic forms of expression commonly used in affidavits, along with suggested alternatives, follow.

Avoid	*preferred alternative*
I verily believe	I believe
I truly believe	I believe
I crave leave to refer to	I refer to
Paragraph 2 of this my affidavit/ Paragraph 2 hereof	paragraph 2 (in the event confusion could result because 'paragraph 2' could refer to something else such as a written agreement, use 'paragraph 2 of this affidavit.')
Praying orders inter alia:	asking for orders including:
At that time and on that date	at the same time

2.3 Plain English decision writing

Judges when writing their judgments could do well to keep in mind the words of the Honourable Geoff Davies QC, a justice of the Queensland Court of Appeal who wrote in a paper he presented to the National Judicial Orientation Program in Sydney on 25 October 2001[45] –

> ..., you should also remember, when you are writing a judgment, that those to whom it is of greatest importance are the parties. It follows that you are writing it primarily for them: to state clearly the orders you propose to impose and to explain to the parties, especially the losing party, why you are making them….
>
> If you bear that in mind, you will write simply and clearly, using simple words rather than complex ones, short rather than long sentences and straightforward rather than convoluted syntax. You will avoid double negatives and Latin maxims like the plague.

[45] (2002) 11 *Journal of Judicial Administration* at 137-138: also see Doyle CJ 'Judgment Writing: Are there Needs for Change?' (1999) 73 *ALJ* 737 AT 740.

> When you come to state legal principles and their application, avoid excessive reference to authority. If the principle is straightforward, of long standing and beyond dispute, it does not need to be decorated with authority. If there is any doubt about the relevant principle, or which principle applies to the case, you must resolve the doubt. But that does not, in most cases, require an essay on the topic.
>
> …you should not sacrifice the parties' need for a clear statement of your orders and the reasons why you are making them, and their need to receive that promptly, for your own desire to write some legal exegsis which you find interesting, or which you think may be instructive to others, but which is not strictly necessary for the result.'[46]

A number of the principles of plain English considered throughout this paper are expressly or impliedly referred to in this passage. From it and from the earlier discussions, a checklist for good decision writing may be devised.

Guidelines for Plain English decision writing

- Consider whether a summary headed 'Summary of reasons' immediately after the paragraph containing key words and phrases would be useful.
- If a summary is used make sure it contains the important facts, the critical questions for resolution and the answers to those questions.
- Consider using a table of contents for the reasons.
- If a summary is included in the reasons it should be clearly separated from the body of the reasons.
- Headings are important for the reader. There must be enough headings to guide the reader through the decision.
- The headings need to clearly relate to the material being discussed under them, they need to be clearly distinguishable from the body of the decision, and headings of different levels need to be clearly distinguishable.
- If it is necessary to directly quote from a previous decision, the relevance of the passage should be succinctly explained and the relevant principle extracted.
- The decision writer should pay particular attention to removing unnecessary

[46] (2002) 11 *Journal of Judicial Administration* at 137-138: also see Doyle CJ 'Judgment Writing: Are there Needs for Change?' (1999) 73 *ALJ* 737 AT 740.

words and phrases, using appropriate language and writing in an appropriate style.

- Shorter paragraphs are often more effective than longer ones.
- There should be a period of time for reflection on the decision before it is given to the parties.

3. Conclusion

Words are the tools of lawyers. The clearer the words, the easier it is to communicate effectively. There is a great deal to be said for using plain English. It saves time and money in administration but its greatest attribute is that it makes it easier for the community to have access to justice. Plain English can present the law in a way that is easier for the layperson to understand. By applying the plain English drafting suggestions contained in this guide, lawyers will be promoting these outcomes for themselves and their clients. As was written by the Chief Justice of Queensland, the Hon Paul de Jersey AC –

> Simplicity is undoubtedly the key to good legal writing…But legal writing and drafting at all levels of the hierarchy, from articled clerk to judge, nevertheless do still draw a lot of criticism onto our profession…it may be trite, but should be said here that improved communication will facilitate the delivery of legal services and thereby, accessible justice.[47]

Further reading

The list below is a selection of books about plain English or with a focus on plain English that practitioners and law students alike may find useful for assisting them in their quest to use plain English.

Aitken, JK, *Piesse's The Elements of Drafting*, 9th ed, Law Book Co, Sydney, 1995
Asprey M *Plain Language for Lawyers* 3rd ed, Federation Press, Sydney, 2003
Butt, P and Castle, R, *Modern Legal Drafting*, Cambridge University Press Cambridge, 2001
Clark-Dickson, D and Macdonald, R *Clear and Precise: Writing Skills for Today's Lawyer*, QLS CLE, Brisbane, 2000, reprinted 2002
Macdonald, R and McGill, D *Drafting*, Butterworths, Sydney, 1997

[47] Forward to *Clear and Precise: Writing Skills for Today's Lawyers* QLS, CLE, Brisbane, 2000 at iv-v.